

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

CITY OF ASHEVILLE
AGREEMENT NO. _____
Amendment # _____

**SECOND RESTATED AND AMENDED PACK SQUARE CONSERVANCY
AGREEMENT**

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THIS AGREEMENT made and entered into this ____ day of June, 2010, by and between the Pack Square Conservancy (herein "Conservancy"), a North Carolina non-profit corporation, and the City of Asheville a North Carolina municipal corporation (herein "City"), for the purpose of restating and amending certain agreements between the parties;

WITNESSETH:

WHEREAS, the City and Conservancy are parties, along with Buncombe County, to an Agreement dated August 14, 2001 (herein "2001 Agreement"), whereby the Conservancy undertook to design and implement a plan for major improvements (herein "Project") to the area known as the Pack Square/City County Plaza (herein "Park"); and

WHEREAS, the City and the Conservancy are also parties to agreements dated March 22, 2005, and May 23, 2006, whereby the Conservancy agreed to carry out certain aspects of the Project, including design and engineering work, to be paid for by the City with funds made available through certain state and federal grants programs; and

WHEREAS, on November 27, 2007, the City awarded a contract to Valley Crest Landscape Development, Inc. (herein "Valley Crest"), to carry out certain construction and improvements for the Project in the amount of \$7,464,912; and

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WHEREAS, the City and Conservancy are parties to a “Restated and Amended Agreement,” dated May 2, 2008 (herein “2008 Agreement”), whereby the Conservancy agreed to reimburse the City for certain payments made by the City (herein “eligible expenses”) to Valley Crest (and other contractors or suppliers, if any) in connection with the construction of the Park, which arrangement was required in order to use certain grant funds for the Project; and

WHEREAS, as the Project has neared completion, the pace of construction work has accelerated, and Valley Crest’s invoices to the City have increased in frequency and amount; and

WHEREAS, the current national economic situation has resulted in a significant reduction of financial support for the Conservancy, and in some pledges not being fulfilled; and

WHEREAS, the Conservancy has been delayed in fulfilling its financial commitment to the City; and

WHEREAS, the City and Conservancy wish to restructure their agreements in order to restate financial and other commitments, and to provide for operation of the Park until said commitments are met.

NOW, THEREFORE, for and in consideration of the premises, and in consideration of the promises and covenants set forth herein, including the payment of \$10 by the Conservancy to the City, the receipt and sufficiency of which is hereby acknowledged by the parties, the Conservancy and the City do hereby agree as follows:

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1. Reaffirmation of Agreements. For themselves, their successors and assigns, the parties restate and affirm the Agreements entered into by and between the parties, including, but not limited to the following:

- (a) The 2001 Agreement;
- (b) Agreement dated March 22, 2005;
- (c) Agreement dated May 23, 2006;
- (d) The 2008 Agreement.

Said agreements, and the terms and conditions thereof, are hereby incorporated by reference as if fully set forth herein, except as modified by this Second Restated and Amended Agreement.

2. Statement and computation of amounts.

- (a) Amounts paid by City, reimbursed by Conservancy. Pursuant to the terms of its contract with Valley Crest, the City has, as of June 1, 2010, paid to Valley Crest amounts aggregating \$_____ (including any amounts paid directly to subcontractors or suppliers). See Exhibit _____. Of this amount, \$_____ was determined to be eligible expenses, and the Conservancy has remitted said amount to the City, and said transactions and payments are final and not in dispute.

- (b) Amounts paid by City, not reimbursed by Conservancy. As of June 1, 2010, the City has received additional invoices from Valley Crest in the aggregate amount of \$_____, which amounts have been remitted by the City to Valley Crest. See Exhibit _____. Of this amount, \$_____

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has been determined to be eligible expenses for which demand has been made by the City to the Conservancy, but payment has not been received by the City, and said payment is overdue pursuant to the 2008 Agreement.

(c) Invoices received by the City payable to Valley Crest. As of the date of this Agreement, the City has received additional invoices from Valley Crest in the amount of \$_____. See Exhibit _____. Of this amount, \$_____ will be paid by the City to Valley Crest, of which, \$_____ has been determined to be eligible expenses for which the City is entitled to reimbursement by the Conservancy, pursuant to the terms of the 2008 Agreement.

(d) Work not yet completed. It is anticipated that Valley Crest will complete its work on the Project not later than _____, 2010, and that final invoices will be submitted to the City not later than _____, 2010. The City will review these invoices for payment in the manner provided for in the City's contract with Valley Crest, and the determination as to which invoiced items are eligible expenses will be made pursuant to the 2008 Agreement, and submitted to the Conservancy for payment pursuant to said Agreement.

3. Conservancy fundraising. The Conservancy commits to continuing and strengthening its fundraising efforts to satisfy its financial commitment to the City, and any other outstanding financial obligations. To this end, the Conservancy

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has outstanding pledges in the amount of \$_____, and requests or “asks” of \$_____, which it reasonably expects to be met in substantial part.

4. Commitment to use of funds. All funds raised by the Conservancy will be applied to its financial commitment to the City, subject to the following exceptions:
 - (a) Funds that the donor has directed to be applied elsewhere (e.g., endowment);
 - (b) Funds needed to pay reasonable Conservancy operating expenses [not to exceed \$_____ per month];
 - (c) Funds used to pay the Conservancy’s outstanding and direct contractual obligations, as set out in Exhibit _____, attached hereto.

During the term of this Agreement, beginning July 1 and quarterly thereafter, the Conservancy shall remit to the City such funds as it has collected, which are not committed elsewhere or encompassed within the above exceptions.

5. Inspections, Permits. The City agrees to cooperate with the Conservancy with respect to conducting inspections of completed work on the Project in a timely manner, and in issuing permits, certificates of occupancy, and other approvals (whether temporary or permanent) in a timely manner.
6. Public restrooms. In addition to its fundraising efforts set out in Paragraph 4, above, the Conservancy agrees to pursue funding and in-kind donations for the design and construction of public restroom facilities in the Park, either as a stand alone facility or as part of a pavilion, office, or information kiosk building.

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7. Programming. During the term of this Agreement, the Conservancy may program activities or events in the Park, pursuant to specific agreements as to cost, fees, scheduling, and other matters to be negotiated with the City Manager or his designee. Such activities and events must promote the Conservancy's fundraising efforts. Said programming shall also be subject to the City's scheduling of the use of the Park. Upon fulfillment of the term and conditions of this Agreement, the parties will enter into negotiation regarding future programming and management responsibilities.
8. Financial reporting. On reasonable notice and at reasonable times, the Conservancy shall make available to the City such records and accounts including property, personnel and financial records as are deemed necessary to the City to assure a proper accounting for all appropriations for this Project. All such records and accounts shall be the property of the City; provided, however, Pack Square may retain copies for its records. The Conservancy shall provide written quarterly reports to the City, to include information on the Conservancy's fundraising activities (amounts pledged, amounts received, etc.) and payments, if any, made to the City.
9. Economic impact. The Conservancy shall work with the Asheville Area Chamber of Commerce or other appropriate agency, to develop empirical information as to the economic impact of the Park (increased visitation to downtown Asheville, real estate value, etc.), as well as any increase in Park usage by scheduled events.

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The City will assist in providing such historical information on the use of the Park as it has on hand.

10. Extension of term for reimbursement. Without waiving any of its rights under the 2008 Agreement or any other agreement among the parties, including the right to declare any reimbursement for any eligible expense to be due and owing, or to declare the Conservancy to be in default of the Agreement, the City agrees to forebear from exercising such rights until no earlier than December 31, 2011, provided that the Conservancy complies with the other terms of this Agreement, particularly including Paragraph 4, above.
11. Public records. The Conservancy acknowledges that the information provided by it to the City is a public record within the meaning of N.C.G.S. Chapter 132. To the extent that any information provided by the Conservancy to the City qualifies as confidential or trade secret pursuant to N.C.G.S. Chapter 132, the Conservancy has the full responsibility for taking appropriate action to designate said information, and the full responsibility to defend any legal action to compel disclosure of such information by the City.
12. Representatives. The City's designated representative and mailing address of the representative is as follows:

City of Asheville
70 Court Plaza
PO Box 7148
Asheville, NC 28802-7148
Attention: Cathy D. Ball, PE
(828) 259-2617

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Pack Square's designated representative and mailing address of the representative is as follows:

Pack Square Conservancy, Inc.
One West Pack Square, Suite 513
Asheville, NC 28801
Attention: Guy Clerici

13. Notice. Any notice that is required or permitted to be given under this Agreement shall be deemed complete upon personal delivery or by certified mail to the representatives identified above. Notice may be waived by the party to whom it is due.
14. Governing Law. This agreement and the rights and obligations of the parties hereunder shall be governed in all respects by the laws of the State of North Carolina.
15. Entire Agreement. This Agreement constitutes the entire written Agreement of the parties with respect to the matters set forth herein and all prior Agreements are merged herein.
16. Successors and Assigns. This Agreement shall be binding upon the undersigned, their successors and assigns, and shall inure to the benefit of their successors and assigns.
17. Severability. Should any provision or provisions contained in this Agreement be declared by a court of competent jurisdiction to be void, unenforceable or illegal, such provision or provisions shall be severable and the remaining provisions hereof shall remain in effect.

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18. Liability / Indemnity. The City for itself, its agents and employees, and Pack Square for itself, its agents, employees, successors and assigns, agree to be responsible for any damage or injury arising from the performance of their respective obligations under this Agreement, and to the extent permitted by law, agree to indemnify and hold harmless the other party from such liabilities. It is the intent of this paragraph that each party will be responsible for any damage or injury caused by its agents or employees in the performance of this Agreement.
19. Assignment. This Agreement may not be assigned by either party without the written consent of the other party.
20. Amendment. This Agreement may only be amended by written instrument executed by both parties.
21. Default; Termination. This Agreement may be terminated by either party for a material default in any provision herein; provided, that written notification of a default is provided to the defaulting party and the defaulting party is provided a reasonable opportunity of not less than 30 days to cure said default. This Agreement may also be terminated at any time by the mutual consent of the parties, expressed in writing. In the event of a failure by Pack Square to make payments as required hereunder, amounting to a default, which default is not cured, the City may bring an action in a court of competent jurisdiction to collect said unpaid funds, and Pack Square hereby waives any and all defenses to such action, except as to amount, and agrees to pay the costs of collection, including attorneys fees.

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In the event of termination for any reason, and in the absence of any other arrangement, the City shall be responsible for the payment of any invoice for completed work that it has approved pursuant to this Agreement from the Grant funds.

IN WITNESS WHEREOF, the parties have caused this restated and amendment to agreement to be signed by their designated representatives and their seals to be hereon affixed as duly authorized by their governing boards on the day and year first above written.

Attest to:

CITY OF ASHEVILLE

Magdalen Burleson, City Clerk
(Corporate Seal)

By: _____
Terry M. Bellamy, Mayor

Attest to:

PACK SQUARE CONSERVANCY, INC.

Secretary
(Corporate Seal)

By: _____
Chair

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

I, _____, a Notary Public of the County and State aforesaid certify that Magdalen Burleson personally came before me this day and acknowledged that she is the City Clerk of the City of Asheville, a North Carolina municipal corporation, and that by authority given and as the act of the corporation, that foregoing instrument was signed in its name by its Mayor and attested by herself as its City Clerk.

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WITNESS my hand and notarial seal this _____ day of June, 2010.

Notary Public

Print or type name _____

My Commission Expires: _____

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

I, _____, a Notary Public of the County and State
aforesaid certify that _____ personally came before me this day and
acknowledged that she is the Corporate Secretary of Pack Square Conservancy, Inc., a
North Carolina non-profit corporation, and that by authority given and as the act of the
corporation, that foregoing instrument was signed in its name by its Chair and attested
by herself as its Corporate Secretary.

WITNESS my hand and notarial seal this _____ day of June, 2010.

Notary Public

Print or type name _____

My Commission Expires: _____